Tetuan Khana & Co v Saling bin Lau Bee Chiang & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02(W)-219–2 OF 2017, J-02(W)-220–02 OF 2017, J-02(W)-221–02 OF 2017, J-02(W)-224–02 OF 2017, J-02(W)-225–02 OF 2017, J-02(W)-226–02 OF 2017, J-02(W)-227–02 OF 2017 AND J-02(W)-228–02 OF 2017

IDRUS HARUN, HASNAH HASHIM AND YEOH WEE SIAM JJCA

12 SEPTEMBER 2018

Civil Procedure — Judgments and orders — Nullity — Whether judgments of trial court nullities because consent of attorney general/public prosecutor ('AG'/'PP') not obtained to commence/continue suits — Section 9 of the Government Proceedings Act 1956 ('the GPA') and s 54(3) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') — Whether AG's consent or personal participation under s 9 of the GPA not required as trust in question before trial court not public or charitable trust but a private trust for benefit of plaintiffs and their direct lineal descendants of full age — Whether s 54(3) of the AMLA had no application as properties seized under notice of seizure by PP belonged to trust and not to individual suspected of having committed money laundering offence under the AMLA

The appeals herein emanated from two judgments of the High Court in two suits ('Suit 106' and 'Suit 228') — consolidated and tried together — filed by different plaintiffs cum beneficiaries under the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust'). The judgments allowed the plaintiffs' claims in both suits and held that the defendants (most of the appellants herein) had, inter alia, committed breaches of trust and of fiduciary duties as trustees/constructive trustees in relation to properties belonging to the trust. The trust was established pursuant to a High Court order and a deed of trust to receive compensation monies that were paid to the *orang asli* of three villages who lost their ancestral lands when a part of Linggiu Valley in Johor was acquired by the state government to build a dam. In a representative action on behalf of the villagers, 52 of the *orang asli* engaged a lawyer ('Kanawagi') to sue the state government for compensation over their loss. The court subsequently ordered that RM38,554,111.92 in compensation (inclusive of interest) be paid to the plaintiffs and that RM22m out of that sum be deposited in an account of the trust and the balance be paid to Kanawagi's legal firm for distribution to the plaintiffs after deduction and payment of all legal fees, costs, consultation fees and expenses. Kanawagi and some of the villagers were named as trustees to the trust. The trustees never furnished any proper accounts concerning the management of the trust and the plaintiffs later discovered that monies

belonging to the trust had been misused, mismanaged or misappropriated in various ways by various parties. Some of the trust monies were used by Kanawagi to buy 27 condominium units ('the properties') in his name. The plaintiffs secured injunctions from the High Court to prevent Kanawagi and others from dealing with the properties. The properties were later seized by the public prosecutor under s 51(1)(a) of the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') on the ground that a money laundering offence had been committed under the Act. The notice of seizure had similar effect as the injunctions in that they prohibited Kanawagi from dealing with the properties. When the instant appeals against the High court's judgments came up for hearing, the appellants sought to have the appeals struck out on the preliminary argument that the trial court's decisions in Suit 106 and Suit 228 were nullities because the attorney general/public prosecutor had not consented to the suits being proceeded with or continued pursuant to s 9 of the Government Proceedings Act 1956 ('the GPA') and s 54(3) of the AMLA. The argument was that: (a) s 9 of the GPA applied because the trust, which was the subject-matter of both the suits, was a public or a charitable trust; and (b) s 54(3) of the AMLA barred the plaintiffs from commencing/maintaining any civil suit in respect of any property seized under the AMLA unless the public prosecutor had given his prior written consent thereto.

Held, unanimously dismissing the preliminary issues:

(1) The trust was not a public trust but a private trust specifically created for the plaintiffs. Accordingly, there was no requirement for the plaintiffs to have obtained the consent in writing of the attorney general to institute these proceedings or for the attorney general to have been joined as a party. The trust was created pursuant to a court order for the benefit of the 52 plaintiffs who were named in the First Schedule. They were the heads of families of *orang asli* who lived in the affected areas. The trust deed provided that the trust beneficiaries were the 52 plaintiffs and 'their direct lineal descendants, but no child-descendant shall be entitled to any share of the distribution of the assets or income during the lifetime of his or her parent'. Those words reflected the clear intention that the trust was created for a specific group of persons in the *orang asli* community and was intended for private purpose. The trust was clearly not a public or charitable trust but was created to safeguard and manage the trust fund pursuant to the High Court order to ensure the 52 plaintiffs as beneficiaries would be given their rightful share of the compensation ordered by the court. Where the beneficiaries were defined by reference to a personal nexus, as in the present case, the trust, as a matter of law, could not be a charitable trust (see paras 37 & 40–43).

(2) The 27 condominiums did not belong to Kanawagi but to the trust since they were purportedly bought by Kanawagi as a trustee for the benefit of

the trust. The properties were also the subject matter of injunctions ordered by the High Court which still remained in force. As such, the properties did not fall within the ambit of the notice of seizure issued to Kanawagi under the AMLA. Based on a reasonable and purposive interpretation of s 54(3) of the AMLA, read together with s 17A of the Interpretation Acts 1948 and 1967, s 54(3) of the AMLA could not be interpreted the way the defendants wanted it to be interpreted, that is, that the plaintiffs were barred from continuing with Suit 106 and Suit 228 in the light of the notice of seizure. The purpose of the AMLA was to provide measures to prevent money laundering and terrorism financing offences — to prevent an accused from dealing with assets or property procured through money laundering or unlawful activities. The instant appeals, however, involved the enforcement of the trust and the allegation that the trustees had mismanaged the trust. The relevant provisions of the AMLA had to be interpreted in line with the purpose and objective of that Act as defined in its preamble. Hence, in the instant case, the High Court had jurisdiction to hear both Suit 228 and Suit 106 (see paras 53 & 56–58).

[Bahasa Malaysia summary

Rayuan ini berpunca daripada dua penghakiman Mahkamah Tinggi dalam dua guaman ('Guaman 106' dan 'Guaman 228') — disatukan dan dibicarakan bersama — difailkan oleh plaintif yang berlainan bersama benefisiari di bawah Lembah Linggiu Orang Asli (Jakun) Amanah ('amanah itu'). Penghakiman membenarkan tuntutan plaintif dalam kedua-dua guaman dan memuttuskan bahawa defendan (kebanyakan perayu di dalamnya) telah, antara lain, melakukan pelanggaran amanah dan tugas fidusiari sebagai pemegang amanah/pemegang amanah konstruktif berhubung dengan harta kepunyaan amanah. Amanah ditubuhkan menurut perintah Mahkamah Tinggi dan surat ikatan amanah untuk menerima wang pampasan yang dibayar kepada orang asli dari tiga kampung yang kehilangan tanah nenek moyangnya apabila sebahagian Lembah Linggiu di Johor diperoleh oleh kerajaan negeri untuk membina sebuah empangan. Dalam satu tindakan yang mewakili penduduk kampung, 52 orang orang asli telah melantik seorang peguam ('Kanawagi') untuk menyaman kerajaan negeri untuk pampasan atas kerugian mereka. Mahkamah kemudiannya memerintahkan supaya pampasan sebanyak RM38,554,111.92 (termasuk faedah) dibayar kepada plaintif dan RM22 juta daripada wang itu akan didepositkan dalam akaun Amanah dan baki dibayar kepada firma guaman Kanawagi untuk diedarkan kepada plaintif selepas potongan dan pembayaran semua yuran guaman, kos, yuran perundingan dan perbelanjaan. Kanawagi dan beberapa penduduk kampung dinamakan sebagai pemegang amanah kepada amanah itu. Para pemegang amanah tidak pernah memberikan apa-apa akaun yang betul mengenai pengurusan amanah itu dan plaintif kemudiannya mendapati bahawa wang kepunyaan amanah telah disalahgunakan, disalah urus atau disalahpakai dalam pelbagai cara oleh

pelbagai pihak. Sebilangan wang amanah digunakan oleh Kanawagi untuk membeli 27 unit kondominium ('hartanah') atas namanya. Plaintif memperoleh injunksi daripada Mahkamah Tinggi untuk menghalang Kanawagi dan yang lain daripada berurusan dengan hartanah. Hartanah itu kemudian disita oleh pendakwa raya di bawah s 51(1)(a) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta') atas alasan bahawa kesalahan pengubahan wang haram telah dilakukan di bawah Akta. Notis penyitaan mempunyai kesan yang sama seperti injunksi di mana mereka melarang Kanawagi daripada berurusan dengan hartanah. Apabila rayuan ini terhadap keputusan Mahkamah Tinggi hadir untuk pendengaran, perayu memohon untuk mendapatkan rayuan dibatalkan pada hujahan awal bahawa keputusan mahkamah bicara dalam Guaman 106 dan Guaman 228 adalah kesalahan kerana peguam negara/pendakwa raya tidak bersetuju dengan guaman itu berjalan atau diteruskan menurut s 9 Akta Prosiding Kerajaan 1956 ('APK') dan s 54(3) AMLA. Hujahnya adalah bahawa: (a) s 9 APK terpakai kerana amanah itu, yang menjadi perkara kedua-dua guaman, adalah orang awam atau amanah amal; dan (b) s 54(3) Akta melarang plaintif daripada memulakan/mengendalikann mana-mana guaman sivil berkenaan dengan apa-apa harta yang disita di bawah Akta melainkan pendakwa raya telah memberikan persetujuan bertulis terlebih dahulu kepadanya.

Diputuskan, sebulat suara menolak hujahan awal:

(1) Amanah itu bukan amanah awam tetapi amanah persendirian yang dibuat khusus untuk plaintif. Oleh itu, tiada syarat bagi plaintif untuk mendapatkan persetujuan secara bertulis daripada peguam negara untuk memulakan prosiding ini atau untuk peguam negara untuk menyertai sebagai satu pihak. Amanah telah dibuat menurut perintah mahkamah untuk faedah 52 plaintif yang dinamakan dalam Jadual Pertama. Mereka adalah ketua keluarga orang asli yang tinggal di kawasan yang terjejas. Surat ikatan amanah menyatakan bahawa benefisiari amanah itu adalah 52 plaintif dan 'keturunan langsung mereka, tetapi keturunan tiada anak berhak kepada mana-mana bahagian pengagihan aset atau pendapatan sepanjang hayat ibu bapanya'. Kata-kata itu mencerminkan niat jelas bahawa amanah itu dicipta untuk kumpulan orang tertentu dalam masyarakat orang asli dan bertujuan untuk tujuan peribadi. amanah itu jelas bukan amanah awam atau amal tetapi diciptakan untuk melindungi dan menguruskan tabung amanah menurut perintah Mahkamah Tinggi untuk memastikan 52 plaintif sebagai benefisiari akan diberi bahagian sah mereka atas pampasan yang diperintahkan oleh mahkamah. Di mana benefisiari ditakrifkan dengan merujuk kepada perhubungan peribadi, seperti dalam kes ini, amanah itu, sebagai undang-undang, tidak boleh menjadi amanah amal (lihat perenggan 37 & 40–43).

(2) 27 kondominium itu bukan milik Kanawagi tetapi milik amanah kerana

mereka dikatakan dibeli oleh Kanawagi sebagai pemegang amanah untuk kepentingan amanah. Hartanah itu juga merupakan perkara yang diperintahkan oleh Mahkamah Tinggi yang masih berkuatkuasa. Oleh itu, hartanah tidak termasuk dalam notis penyitaan yang dikeluarkan kepada Kanawagi di bawah Akta. Berdasarkan tafsiran yang munasabah dan purposive dari s 54(3) Akta, dibaca bersama dengan s 17A Akta Interpretasi 1948 dan 1967, s 54(3) Akta tidak dapat ditafsirkan bagaimana defendan mahu ia ditafsirkan, iaitu, bahawa plaintif telah dihalang daripada meneruskan dengan Guaman 106 dan Guaman 228 berdasarkan notis penyitaan. Tujuan Akta adalah untuk menyediakan langkah-langkah untuk mencegah kesalahan pengubahan wang haram dan pembiayaan keganasan — untuk menghalang tertuduh daripada berurusan dengan aset atau harta yang diperoleh melalui pengubahan wang haram atau aktiviti yang menyalahi undang-undang. Walau bagaimanapun, rayuan ini melibatkan penguatkuasaan amanah itu dan dakwaan bahawa para pemegang amanah telah salah menguruskan amanah. Peruntukan Akta yang relevan harus ditafsirkan sejajar dengan tujuan dan objektif Akta tersebut sebagaimana yang ditakrifkan dalam mukadimahnya. Oleh itu, dalam kes ini, Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar kedua-dua Guaman 228 dan Guaman 106 (lihat perenggan 53 & 56–58).]

Notes

For cases on nullity, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5669–5677.

Cases referred to

Oppenheim v Tobacco Securities Trust Co Ltd and Others [1951] 1 All ER 31, HL (refd)

The Commissioners for Special Purposes of the Income Tax v John Frederick Pemsel [1891] AC 531, HL (distd)

Legislation referred to

Anti Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1), 51(1), (1)(a), (2), (3), 54(1), (3)

Government Proceedings Act 1956 s 9

Interpretation Acts 1948 and 1967 s 17A

Appeal from: Civil Suit Nos 23NCVC-106–07 of 2012 and 22–228 of 2009 (High Court, Johor Bahru)

Gopal Sri Ram (Nagarajan Periasmay, Vinoshini Narayanasamy and David Yii with him) (T Ananthasivam) in Civil Appeal No J-02(W)-219–02 of 2017 for the appellants.

Ranjan Chandran (Manjeet Singh, Shopna Rani, Shoba Veera and Velary

Velaythan with him) (Hakem Arabi & Assoc) in Civil Appeal No J-02(W)-220–02 of 2017 for the appellants.

Bastian Vendargon (Gene Anand Verdagon with him) (Shopna Rani Malakar & Co) in Civil Appeal No J-02(W)-221–02 of 2017 for the appellants.

VS Viswanthan (G Nadesh and Velary Velayathan with him) (Malek, Paulian & Gan) in Civil Appeal No J-02(W)-224–02 of 2017 for the appellants.

Dinesh Athinarayanan (Sathayananthan Sinnappan with him) (Azri, Lee Swee Seng & Co) in Civil Appeal No J-02(W)-225–02 of 2017 for the appellants.

Gopal Sri Ram (TA Sivam and David Yii with him) (T Ananthasivam) in Civil Appeal No J-02(W)-226–02 of 2017 for the appellants.

Annou Xavier (Yong Jia Wei with him) (Azri, Lee Swee Seng & Co) in Civil Appeal No J-02(W)-227–02 of 2017 for the appellants.

Wong Rhen Yen (Ahmad Ezmeel Tarmizi with him) (Shopna Rani Malakar & Co) in Civil Appeal No J-02(W)-228–02 of 2017 for the appellants.

Tommy Thomas (Ragumaren Gopal, Kenneth Koh, MV Nathan and Gengeys Vijay with him) (G Ragumaren & Co) in Civil Appeal Nos J-02(W)-219–02 of 2017, J-02(W)-220–02 of 2017 and J-02(W)-221–02 of 2017 for the respondents.

Prakash Menon (Renu Zechariah, Cheryl Kwan, TT Ng and Gengys Vijay with him) (Rosley Zechariah) in Civil Appeal Nos J-02(W)-224–02 of 2017, J-02(W)-225–02 of 2017, J-02(W)-226–02 of 2017, J-02(W)-227–02 of 2017 and J-02(W)-228–02 of 2017 for the respondents.

Hasnah Hashim JCA (delivering judgment of the court):

[1] There are a total of eight appeals emanating from two separate judgments but based on common facts. Two suits were filed in the High Court, Civil Suit No 22–228 of 2009 ('Suit 228') and civil suit 23NCVC-106–07 of 2012 ('Suit 106'). Both the suits were ordered to be consolidated. The appeals by the appellants (the defendants in the High Court) are against the decision of the High Court dated 22 December 2016 after a full trial, which allowed the plaintiffs' claim against the defendants. The appeals were ordered to be heard together. The appeals are:

Suit 228:

(a) Civil Appeal No J-02(W)-219–02 of 2017 ('219');

(b) Civil Appeal No J-02(W)-220–02 of 2017 ('220'); and

(c) Civil Appeal No J-02(W)-221–02 of 2017 ('221').

Suit 106:

(d) Civil Appeal No J-02(NCVC)(W)-224–02 of 2017 ('224');

(e) Civil Appeal No J-02(NCVC)(W)-225–02 of 2017 ('225');

(f) Civil Appeal No J-02(NCVC)(W)-226–02 of 2017 ('226');

(g) Civil Appeal No J-02(NCVC)(W)-227–02 of 2017 ('227); and

(h) Civil Appeal No J-02(NCVC)(W)-228–02 of 2017 ('228').

[2] Appeals 219, 220 and 221 are appeals against the decision of the learned High Court judge in Suit 228 whereas appeals 224, 225, 226, 227 and 228 are the appeals against the decision of the High Court in Suit 106.

[3] At the commencement of the hearing of the appeals on 26 February 2018 learned counsels for the appellants informed the court that they wish to raise two preliminary issues. The preliminary issues are:

(a) that the Suit 228 and Suit 106 filed in the High Court at Johor Bahru can only be brought by the attorney general or with his consent pursuant to s 9 of the Government Proceedings Act 1956 ('the GPA') and as such the decision by the High Court in both suits are a nullity and ought to be set aside; and

(b) that Suit 228 and Suit 106 were proceeded in contravention of s 54(3) of the Anti Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') as the plaintiffs failed to get the prior written consent of the public prosecutor ('PP') and as such the decision of the two suits are a nullity and ought to be set aside.

[4] We heard the arguments on the preliminary issues and after hearing submissions from learned counsels for the appellants and the respondents, we unanimously dismissed both the preliminary issues. We now give our reasons for deciding so.

[5] For ease of reference, in this judgment, the parties will be referred to as they were in the High Court. The background facts of this appeal are important to understand the context in which these appeals and the preliminary issues were brought.

A BACKGROUND FACTS

The land acquisition

B **[6]** Sometime in early 1990s the State Government of Johor acquired 53,272 hectares of land in the Linggui Valley located in the Kota Tinggi District, Johor ('the land') for the purposes of the construction of a dam to supply water pursuant to an agreement with the Government of the Republic of Singapore. The acquisition of the land affected mainly three *orang asli* villages:

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(a) Kampung Sayong Pinang;

(b) Kampung Semanggar; and

(c) Kampung Pasir Intan.

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[7] As a consequence of the acquisition the *orang asli* from the three villages were deprived of the use of their ancestral land and traditional sources of income. The plaintiffs claimed that they were restricted from entering the said acquired area to forage for their livelihood and food. Sometime in 1994, 52 of the affected *orang asli* living in the three villages decided to sue the State Government of Johor for compensation vide Suit No Originating Summons No 24–828–94 ('Suit 828'). In Suit 828 they sought the following declarations:

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F (a) a declaration that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggui Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve; and

(b) a declaration that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of the Republic of Singapore or a sum deemed just by the court.

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[8] One Hamzah Mohd Tahir ('Hamzah') led the negotiation on behalf of the *orang asli* with the Johor State Government. However, the negotiations failed. Hamzah then introduced the three Tok Batins ('the village headmen') to the first defendant in Suit 228 ('Kanawagi').

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[9] The three Tok Batins were:

I (a) Adong bin Kuwau, the Tok Batin of Kampung Sayong Pinang, the second defendant in Suit 228 suit ('Tok Batin Adong');

(b) Daud bin Kadir, the Tok Batin for Kampung Semanggar, the third defendant in Suit 228 ('Tok Batin Daud'); and

(c) Abdul Rahman bin Abdullah of Kampung Pasir Intan who was however, not a Tok Batin ('Abdul Rahman'). A

[10] The 52 *orang asli* appointed Kanawagi of Messrs Khana & Co, the fourth defendant, in the same suit to represent them in Suit 828. Kanawagi, through his law firm, Khana & Co, acted for the 52 *orang asli* in their claim for compensation in Suit 828. On *19 December 1995* the learned High Court judge allowed the plaintiffs' claim and declared that the State Government of Johor pay the plaintiffs the compensation received by them from the Government of the Republic of Singapore or a sum deemed just by the court. The High Court ordered the sum of RM26.5m as compensation ('the compensation sum') to be paid to the 52 *orang asli* ('the compensation order'). B C

[11] Dissatisfied with the High Court's decision, the Johor State Government appealed to the Court of Appeal. The appeal was, however, dismissed with costs by the Court of Appeal on *19 November 1997*. The matter was subsequently remitted to the Johor Bahru High Court to decide on the mechanics of the distribution of the payment of the compensation sum to the 52 *orang asli*. Khana & Co on behalf of the 52 *orang asli* filed an originating summons for an order for the management and distribution of the said compensation sum awarded ('the OS'). D E

[12] Pursuant to the OS the Johor Bahru High Court on *5 June 2000* ordered as follows: F

(a) the sum of RM22m forming part of compensation and interest awarded to the plaintiffs pursuant to the judgment dated 29 December 1995, as varied by the order of the Court of Appeal in Civil Appeal No J-01–65 of 1997 on 19 November 1997 be paid into and held in trust in the name of the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust') established pursuant to the order dated 5 June 2000 in terms of the deed of trust ('the trust deed') as amended and approved by court; G

(b) the duration of the trust shall be 25 years;

(c) Tok Batin Adong (Tok Batin for the community in Kampung Pasir Assam (Pasir Intan), Abdul Rahman (for the community in Sayong Pinang) and Kanawagi be appointed as the first trustees, and who shall execute the trust deed; H

(d) the Director General of Jabatan Hal Ehwal Orang Asli, Malaysia, ('DGJHEOA') for the time being shall be appointed the additional trustee of the trust; I

(e) the defendants shall pay the sum of RM22m direct to the account of the trust upon notification of its establishment;

(f) the balance of the compensation sum inclusive of the accrued interest (other than the said sum of RM22m and accrued interest thereon shall be paid to Khana & Co to be distributed to the 52 *orang asli* after the deduction and payment of all legal fees, costs, consultation fees and expenses incurred for the purpose of, and in connection with, the prosecution of the OS and all subsequent and related proceedings; and

(g) the trustees shall have liberty to apply in relation to the implementation of the trust and the performance of their duties under the said trust.

('the trust order').

[13] By the trust order, the trust deed dated *5 June 2000* was created governing the terms relating to the judgment sum, the subject matter of the trust under the management and control of the trustees so named. The High Court retained control and supervision of the trust. On 5 July 2000 the Johor State Government paid RM22m directly to the trustees. On *13 July 2000* the Johor State Government paid the balance sum of RM16,554,111.92 directly to Khana & Co.

The deed of trust ('the trust deed')

[14] The salient terms of the trust as embodied in the trust deed are:

(a) the compensation sum including principal and interest as at 31 May 2000, amounts to slightly over RM38m (re: para 3 of the recital of the trust deed);

(b) the compensation sum of RM22m is kept in trust for the 52 *orang asli* and their descendants but no child descendant shall be entitled to any share or distribution of the assets or income during the lifetime of his or her parent (re: cl 2 of the trust deed);

(c) the number of trustees shall not exceed four and shall comprise:

(i) the two Tok Batins residing in Kampung Pasir Assam (Pasir Intan), Sayong Pinang and Semanggar;

(ii) the DGJHEOA, for the time being provided he is willing to accept the appointment as trustee;

(iii) one other independent trustee appointed by the court; (re: cl 3.1 of the trust deed);

(d) the first trustee shall be:

(i) Adong bin Kuwau, Tok Batin of Kampung Pasir Assam (Pasir Intan);

(ii) Abdul Rahman representing the community in Sayong Pinang; and

(iii) Kanawagi (re: cl 3.2 of the trust deed);

(e) the trustees shall, unless varied by an order of the court pay the sum of RM900 per month to all the beneficiaries of the trust (re: cl 4.2 of the trust deed);

(f) the trustee shall stand possessed of the income of the trust fund in every financial year upon trust to apply or set aside the same or any parts thereof to or for the benefit of the beneficiaries (re: cl 4.1 of the trust deed); and

(g) the trustees to maintain proper accounts (re: cl 8 of the trust deed).

The disbursement of the compensation sum

[15] On or about *5 July 2000* the Johor State Government paid the compensation sum of RM22m directly to the legal firm, Khana & Co. On *13 July 2000* the State Government of Johor paid a further sum of RM16,554,111.92 to Khana & Co in accordance with the terms of the trust order. Pursuant to the High Court order dated 5 June 2000 the following payments, inter alia, were made:

(a) RM2.2m was paid to Hamzah bin Tahir;

(b) RM1.9m and RM3m were paid to Messrs R Rajasingam & Co;

(c) RM500,000 was paid to Messrs RR Sethu; and

(d) the sums of RM500,000 and RM4,054,222.93 were paid to Messrs Khana & Co as legal fees.

[16] The trustees then placed the compensation sum of RM22m in a fixed deposit and through the two Tok Batins paid the RM900 per month including any monthly interest balance to the beneficiaries as stipulated under cl 5 of the trust deed from October 2000–March 2009.

[17] By a court order dated *4 April 2006* (JB Suit 24–197 of 2006) Kanawagi and Messrs Khana & Co were ordered to provide a financial statement of the trust certified by a qualified public accountant. However, through their solicitors, Messrs Sharifah & Associates, the defendants instead submitted unaudited/uncertified financial statements for the years 2000–2006 which in essence was in violation of the said court order. Thus, the plaintiffs contended that by doing so the defendants are in breach of cl 8.1 of the trust deed which stipulates:

> In each financial year the trustees shall have prepared by a certified public accountant authorized to practise in Malaysia financial statements, including a profit and loss account and balance sheet as at and of each financial year certified by such accountant to be true and proper statement of the affairs of the trust setting out all:

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(a) income of the trust fund;

(b) capital of the trust fund;

(c) costs and disbursements and other outgoings paid or payable out of the trust fund and chargeable against income;

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(d) capital expenditure and liabilities chargeable to capital;

(e) investments and money comprised in the trust fund;

(f) amounts distributed by the Trustees to each beneficiary;

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(g) to the extent to which the Trustees may require, the separate recording of any category of income capital.

The 27 condominium units

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[18] On *1 August 2008*, the trustees withdrew RM7m out of the RM22m and purchased 27 condominium units located in Lanai, Gurney, Setapak Kuala Lumpur as an investment. On *5 September 2008* the first plaintiff, Saling Lau, lodged a police report against the trustees for impropriety in the management of the trust. The 27 condominium units were subsequently seized under the
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AMLA. Kanawagi and his son, Dinesh were charged for criminal breach of trust ('CBT') and under the AMLA. The sessions court at the end of the prosecution's case acquitted and discharged both Kanawagi and Dinesh without calling for their defence. On appeal, the High Court upheld and affirmed the decision of the sessions court.

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The appointment of receiver and manager (R&M)

[19] On *25 March 2009*, 33 of the 52 beneficiaries filed an action in the Johor Bahru Court vide Suit 228 to vary the orders made by the High Court
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judge in 2000. The High Court judge on *25 March 2009* ordered the suspension of the trustees and appointed an interim receiver and manager ('R&M') to manage the trust.

[20] After the appointment of the R&M, the R&M filed a suit in the Kuala
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Lumpur High Court relating to the same subject matter (MTKL 22NCC-1512–09 of 2011) ('Suit 1512').The first to seventh defendants subsequently filed an application to transfer Suit 1512 to Johor Bahru and for it to be consolidated with the first suit. The High Court, however, dismissed the application to transfer the suit. On appeal, the Court of Appeal allowed the
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appeal and ordered the KL Suit to be transferred to Johor Bahru High Court and to be consolidated with the other suits.

[21] The plaintiffs, as beneficiaries of the trust in Suit 228, sued the defendants for the following:

(a) for breaches of the trust;

(b) as against Kanawagi and Khana & Co for breach of constructive trust relating to the balance sum of RM16,554,111.92; and

(c) as against the two Tok Batins, for knowingly receiving monies from the trust.

SUIT 228

[22] In Suit 228 the plaintiffs claimed that Kanawagi and Tok Batin Adong, as trustees of the trust, owed fiduciary duties to the plaintiffs as beneficiaries of the trust, whilst Khana & Co as constructive trustees of the amounts received and held by them in respect of the trust. It is the plaintiffs' pleaded case that the defendants committed various breaches of the trust and/or assisted in those breaches of the trust to the detriment of the plaintiffs.

[23] In the same suit, the plaintiffs contended that the defendants failed, refused and/or neglected to provide and render any information and accounting whatsoever in respect of the trust and the trust fund.

[24] The plaintiffs appointed Folk Corporate Services Sdn Bhd ('Folk') to audit the unaudited financial statement. Folk prepared a report dated 17 January 2008 and made certain findings which formed the basis for the claims in Suit 228:

(a) the trust deed has been breached for failing to include the DGJHEOA as trustee;

(b) there are less than four trustees which is not in accordance with the terms of the trust deed;

(c) between the years 2000–2006, the sum of RM5,511,457 was paid to the beneficiaries. However, a sum of less than RM2,778,300 was instead received by the beneficiaries and there was no accounting for this discrepancy;

(d) no details of the legal fees, costs, consultant fees and expenses with regards to the payment of RM16,554,111.92 as legal fees;

(e) the sum of RM2,716,920 was not accounted for. This is the sum purportedly paid to three Tok Batins for the purposes of distribution to the beneficiaries but the plaintiffs as beneficiaries were not aware nor had they received this sum or any part thereof; and

(f) no tax has been paid on the revenue.

[25] The prayers sought for in Suit 228, amongst others, are as follows:

(a) removal of the current trustees from the trust and the reappointment of new trustees;

(b) the trust fund is to be managed by HSBC (Malaysia) Trustee Bhd ('HSBC trustee');

(c) the agent and person appointed by the defendants in the trust to cease handling of the trust matter and to hand over all documentation, monies and matters relating to management of the trust. In case there are non-compliance, the court registrar to give effect to the order;

(d) an audited account in respect of the sum RM16,554.111.92 to be given by the defendants to HSBC trustee;

(e) an audited account in respect of RM22m forming part of the actual compensation;

(f) the third defendant, Tok Batin Daud, to provide an account of all the monies paid to him by the trust and the other defendant, Tok Batin Adong;

(g) special damages; and

(h) general damages and costs.

[26] Sometime in 2009, 78 beneficiaries vide Civil Suit No 22–228 of 2009 applied ex parte for an injunction which was granted by the High Court on 17 April 2009. The defendants were restrained from disposing, dissipating and/or diminishing the assets of the trust. On a second application the High Court on 5 May 2009 granted an ad interim order appointing a R&M to receive and manage all the assets of the trust. The defendants were ordered to deliver all the assets of the trust to the R&M, in particular, the 27 condominium units.

[27] The defendants applied to set aside the injunctions. However, the applications were dismissed by the High Court on *11 September 2009*. The defendants' appeal to the Court of Appeal was dismissed which means both the injunctions still remain in force.

[28] On *6 August 2012* the PP seized the 27 condominium units pursuant to s 51(1)(a) of the AMLA as they were purported to be the subject matter of an offence under s 4(1) of the AMLA. The notice of seizure dated 6 August 2012 stated in clear terms that Kanawagi was prohibited from dealing with the property in any manner whatsoever.

SUIT 106

[29] In Suit 106 the plaintiff ('the trust') claimed that the first–seventh defendants had unlawfully conspired with each other to injure the plaintiff by:

(a) utilising the trust fund to purchase the 27 condominium units of the Lanai Gurney Condominium in the name of the fourth defendant, Kanawagi, who confirmed that he bought the same for the plaintiff but in respect of which, to date, documents and information evidencing the title have not been given to the plaintiff;

(b) unlawfully and fraudulently procuring and entering into a management agreement ('MA') with onerous and unfair terms to benefit themselves;

(c) utilising the plaintiff's asset namely, the 27 condominium units, to earn secret profits and failing to render any accounts or information as to the same;

(d) utilising the trust to increase the paid up capital of the first defendant, Virgin Properties Sdn Bhd ('Virgin'), by issuing shares with respect to such increase to the second and third defendants, namely Ku Azhar bin Ku Abdul Razak and Dinesh and making cash advances therefore to the second and third defendants;

(e) unlawfully utilising the trust's assets to make secret profits and failing to render accounts for the same and failing to render accounts for all other income and expenses earned from the 27 condominium units;

(f) purchasing additional 30 condominium units with the assistance of the trust fund and/or its assets;

(g) the first–seventh defendants have breached their fiduciaries duties to the trust and also their contractual duties and statutory obligations;

(h) the first–seventh defendants have failed and refused to render accounts with regards to the use of the sum RM7m the monies collected and expended under the MA and the assets of the plaintiff; and

(i) the sixth and seventh defendants have breach their legal and professional duties owed to the plaintiffs for failing to ensure the completion of the SPA of the 27 condominium units with the plaintiffs as rightful owner and was negligence to release the RM7m sum.

[30] The defendants named in the 106 Suit are:

(a) Virgin Properties Sdn Bhd;

(b) Ku Azhar bin Ku Abdul Razak;

(c) Dinesh Kanavaji a/l Kanawagi;

(d) Kanawagi a/l Seperumaniam;

(e) Tetuan Khana & Co;

(f) Riza Makhzan Arifin;

(g) Puteri Nurul Intan Arzian Abdul Aziz; and

(h) Mampu Jaya Sdn Bhd.

[31] Having set out the background of the case, we shall now consider the two preliminary issues raised by the defendants.

THE FIRST PRELIMINARY ISSUE

Whether the two civil suits (228 and 106) filed in the High Court at Johor Bahru can only be brought by the attorney general or with his consent under s 9 of the Government Proceedings Act 1956 ('the GPA') and as such the decision by the High Court in both suits are a nullity and ought to be set aside

[32] Learned counsel for the defendants argued in submission that the appeals are in violation of s 9 of the GPA which reads:

> 9(1) In the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of —
>
> (a) asserting any interest or right in the trust property;
>
> (b) removing any trustee;
>
> (c) appointing a new trustee;
>
> (d) vesting any property in a trustee;
>
> (e) directing accounts and inquiries;
>
> (f) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust; authorizing the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged;
>
> (g) settling a scheme; and
>
> (h) obtaining such further or other relief as the nature of the case may require.
>
> (2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.

[33] The subject matter of both the suits is the trust deed created pursuant to an order of the court for the benefit of the *orang asli*. It is the submission of learned counsels for the defendants that the trust in question is a public or charitable trust as opposed to a private trust because it satisfies the three essentials laid down in *The Commissioners for Special Purposes of the Income Tax v John Frederick Pemsel* [1891] AC 531 where Lord Macnaghten described charitable trust as follows:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. There is also a requirement that the trust's purposes benefit the public (or some section of the public), and not simply a group of private individuals.

[34] The four heads of charity as laid down in *Pemsel* are in respect:

(a) the relief of poverty;

(b) the advancement of education

(c) the advancement of religion; or

(d) other purposes beneficial to the community not falling under any of preceding heads.

[35] It was strenuously argued by learned counsel for the defendants that the trust is undoubtedly a charitable trust, and it is for the public benefit. the trust provided for the advancement of education as well as other purposes beneficial to the *orang asli* community named in the trust deed. Therefore, s 9 of the GPA is applicable.

[36] Pursuant to aforesaid section, therefore the plaintiffs must obtain the written consent of the attorney general in order to institute the suit or the attorney general must be joined as a party in any existing suit on behalf of the government or the public for the purpose of the trust. Thus, there was an obvious total failure by the plaintiffs to comply with the expressed requirements of s 9 of the GPA. Since there is no prior written consent of the attorney general as required under the said provision the court has no jurisdiction to consider the dispute. On this ground alone this action is wholly misconceived and should fail.

[37] With respect, we do not agree with the submissions of learned counsels for the defendants. the trust was created pursuant to a court order dated 5 June 2006 for the benefit of the 52 plaintiffs who are named in the First Schedule.

By the compensation order, the sum of RM26.5m was awarded by the court to the 52 plaintiffs for the deprivation of use of their rights to derive income and earn their livelihood at the forest reserve and state land at the Linggui Valley, near Kota Tinggi, Johore.

[38] Lord Simonds in the case of *Oppenheim v Tobacco Securities Trust Co Ltd and Others* [1951] 1 All ER 31 said:

> The question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *In re Compton* [1945] Ch 123, of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

[39] His Lordship remarked that whilst the law of charity is pervaded with illogicalities:

> It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established.

[40] The 52 plaintiffs are heads of families representing the orang asli living around the Sungai Linggiu catchment area and it is expressly provided under cl 2 of the trust deed that the beneficiaries of the trust are the 52 plaintiffs and '... their direct lineal descendants but no child-descendant shall be entitled to any share of the distribution of the assets or income during the lifetime of his or her parent'. These words reflected the crystal clear intention of the purpose of the creation of the said trust to create a trust for specific group of persons in the *orang asli* community and intended for private purpose. Where the beneficiaries are defined by reference to a personal nexus as in the case before us, the trust, as a matter of law, cannot be charitable.

[41] We find that there is absolutely no element of public interest and/or that the trust is for public purpose. The trust does not fall under any of the categories of charities as described in the *Pemsel*'s case. It was not created for the purpose for relief of poverty. It is a trust created to safeguard and manage the trust fund pursuant to the order of the High Court to ensure that the 52 plaintiffs, as the beneficiaries, will be given their rightful share of the compensation as ordered by the High Court.

[42] Based on the court order dated 5 June 2000, the trust deed and all other relevant documents relating to the trust, we are of the considered view that the trust is clearly not a public trust nor is it a charitable trust. There is no element of a public trust — that it is a trust for charitable or education purposes. The terms of the trust deed are articulately defined — the purpose, from the moment of its conception, is a private trust as ordered by the High Court. The trust created specifically for the benefit of the 52 plaintiffs and limited to their direct lineal descendants. No child-descendant shall be entitled to any share of the distribution of the assets or income during the lifetime of his or her parent.

[43] That being the case, therefore, there is no requirement for the plaintiffs to obtain the consent in writing of the attorney general in order to institute this proceeding, or for the attorney general to be joined as a party to this proceeding. We, therefore, hold that the trust is not a public trust, but is a private trust specifically created for the plaintiffs.

THE SECOND PRELIMINARY ISSUE

The two Civil Suits 228 and 106 were proceeded in contravention of s 54(3) of the AMLA as the plaintiff failed to get the prior written consent of the public prosecutor as such the decision of the two suits are a nullity and ought to be set aside

[44] The second preliminary issue is in respect of the 27 condominium units located in Gurney Heights, Setapak, Kuala Lumpur. The 27 condominium units were purchased utilising the trust fund by Kanawagi and his son, Dinesh. Sometime in 2008, Kanawagi purchased the 27 condominium units purportedly on behalf of the trust. Kanawagi is named as the purchaser in the SPA. Kanawagi then entered into MA with Virgin, a company owned and controlled by Kanawagi and his son, Dinesh.

[45] Learned counsel for the plaintiffs highlighted to this court in their submission that the injunctions as ordered by the High Court of Johor Bahru on *17 April 2009 and 5 May 2009* still remain in force. Kanawagi, Dinesh and Khana & Co by the injunctions were not only ordered to deliver possession, custody and control of the 27 condominium units but were restrained from dealing with the said units. By the said High Court order their powers of managing the said 27 condominium units were transferred to the R&M and under the High Court's supervisory jurisdiction.

[46] On *6 August 2012* the PP seized the 27 condominium units pursuant to s 51(1)(a) of the AMLA as they were the subject matter of an offence under s 4(1) of the same Act. Similar to the Injunctions ordered by the High Court in 2009, the notice of seizure dated 6 August 2012, Kanawagi was prohibited from dealing with the property. Learned counsel for the plaintiffs argued that on the date of the seizure, the 27 condominium units effectively did not belong

to Kanawagi either in law or in equity as the properties were under the purview and management of the R&M, and in law were not Kanawagi's personal assets. Thus, the notice of seizure covers only in respect of Kanawagi's assets but not the assets under the trust.

[47] In response, it was submitted by learned counsels for the defendants that the two suits had effectively come to an end on 22 December 2016 despite that being the case, the trial judge proceeded to hear in contravention of s 54(3) of the AMLA. No action, suit or other proceedings of a civil nature can be instituted in respect of the property which has been seized. The trial of the both the suits was therefore a nullity.

[48] Where any immovable property is seized under s 51(1) of the AMLA the seizure shall be effected by the following actions taken:

> (1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is the subject-matter of an offence under subsection 4(1) or evidence of the commission of such offence, such property may be seized, and the seizure shall be effected —
>
> (a) by the issue of a Notice of Seizure by the Public Prosecutor setting out the particulars of the immovable property which is seized in so far as such particulars are within his knowledge, and prohibiting all dealings in such immovable property;
>
> (b) by publishing a copy of such Notice in two newspapers circulating in Malaysia, one of which shall be in the national language and the other in the English language; and
>
> (c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land titles, as the case may be, in Sarawak, of the area in which the immovable property is situated.

[49] Section 51(3) of the AMLA further provides:

> Where an endorsement of a Notice of Seizure has been made under subsection (2), the Notice shall have the effect of prohibiting all dealings in respect of the immovable property, and after such endorsement has been made no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such Notice or the making of such endorsement.

[50] Section 51(2) of the AMLA stipulates once the Registrar of Titles has been served with a Notice of Seizure he must endorse the terms of the notice of seizure on the document of title in respect of the immovable property in the register at his office:

The Land Administrator, the Collector of Land Revenue, the Director of Lands and Surveys, the Registrar of Titles or the Registrar responsible for land titles, as the case may be, referred to in subsection (1) shall immediately upon being served with a Notice of Seizure under that subsection endorse the terms of the Notice of Seizure on the document of title in respect of the immovable property in the Register at his office.

[51] For so long as the seizure remains in force any dealings remain null and void. This is provided under s 54(1) of the AMLA:

(1) Where any property has been seized under this Act, and so long as such seizure remains in force, any dealing effected by any person or between any persons in respect of such property, except any dealing effected under this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority.

(2) Subsection (1) shall be in addition to and not in derogation of subsections 51(3) and (4).

(3) For so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgement or decree, regardless whether such claim was made, or such judgement or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor.

[52] We agree with the submissions of learned counsels for the defendants that the provisions under the AMLA are crystal clear — where an endorsement of a notice of seizure has been made, it shall have the effect of prohibiting all dealings in respect of the immovable property. After such endorsement has been made, no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such notice or the making of such endorsement.

[53] However, in the instant appeals before us, the properties in question, ie the 27 condominium units do not belong to Kanawagi but belong to the trust, and the said 27 condominium units are the subject matter of the injunctions ordered by the High Court which still remain in force. As such, the 27 condominium units do not fall within the ambit of the notice of seizure issued to Kanawagi.

[54] The AMLA is a legislation to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences. The Act empowers the relevant authority to forfeit property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence and for matters incidental thereto and connected therewith.

[55] Section 17A of the Interpretation Acts 1948 and 1967 (consolidated and revised 1989) ('the Interpretation Acts') provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[56] Since the 27 condominium units were purportedly purchased by Kanawagi as a trustee to the trust, to invest on behalf of the beneficiaries, they cannot fall within the scope of the notice of seizure issued. The 27 condominium units are also the subject of the injunctions which have not been lifted, set aside or varied and therefore remain enforceable. As we have stated earlier the purpose of the AMLA is to provide for measures to be taken for the prevention of money laundering and terrorism financing offences — to prevent an accused from dealing with assets or property procured through money laundering or unlawful activities. The appeals before us involve the enforcement of the trust and the allegation of mismanagement of the trust by the trustees.

[57] Thus, regarding the second preliminary issue we are of the opinion that based on a reasonable and purposive interpretation of s 54(3) of the AMLA, read together with s 17A of the Interpretation Acts the provision of s 54(3) of the AMLA cannot be interpreted the way that the defendants want it to be, that is, the plaintiffs are barred from continuing with the Suit 228 and Suit 106 in the light of the notice of seizure issued. In our view, we must interpret the relevant provisions of the AMLA to be in line with its purpose and objective as defined in the preamble to the said Act.

[58] Therefore, we are of the considered view that the High Court has jurisdiction to hear both Suit 228 and Suit 106.

CONCLUSION

[59] Having considered both the written as well as oral submissions of learned counsels on the two preliminary issues and having perused the appeal

records we find no merits in the two preliminary issues raised by the defendants.

[60] Accordingly, we dismissed the two preliminary issues. The parties are ordered to proceed with the hearing of the appeals.

Preliminary issues dismissed.

Reported by Ashok Kumar